United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-1348

BPAS

To Be Argued By
WALLACE MUSOFF

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1348

UNITED STATES OF AMERICA,
Appellee,

v.

JOSEPH BUGLIARELLI,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY-BRIEF FOR DEFENDANT-APPELLANT

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REPLY BRIEF FOR THE DEFENDANT-APPELLANT

Preliminary Statement

This is a reply to the brief filed by the United States in the United States Court of Appeals for the Second Circuit and received by the defendant-appellant on January 8, 1976.

Statement of Facts

Defendant's response to the statement of facts set forth in the government's brief is limited to four observations.

First, the defendant never disputed the expenditures made during the years 1970 and 1971, and so stated at the trial

and in his opening brief. (D.B. at 2,4)[1] The defendant, however, takes strong issue with the government's unsupported conclusory assertion that (1) it established a likely source of income for the years in issue, 1970 and 1971, and (2) that the evidence purportedly used to establish a likely source of income for each such year, the wire-recording of February 11, 1972 and attendant testimony, was not sufficiently prejudicial that its admission into evidence was reversible error.

Second, the government makes the assertion that "there was no evidence to indicate that Bugliarelli derived unemployment insurance during the first four months of 1971..." (G.B. 2) The fact is that there is no evidence presented by the prosecution that Mr. Bugliarelli did not derive unemployment insurance during this period. In this regard, the prosecution obviously has forgotten that its only witness in this area, Miss DeBlase, had her entire testimony striken. (T 397-98)[2]

Third, the factual account presented by the government states that the events of February 11, 1972 were "less than 45 days after the tax years at issue." (G.B. 3) This is clearly a distortion and only heightens the position of the defendant that the wire-recording and attendant testimony of February 11,

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1/ To delineate between references to the government's brief and the defendant's, the former will be signified by "G.B." and the latter "D.B."

2/ The proclivity of the prosecutor to bring before this Court "facts" not in evidence is not limited to the statement regarding unemployment insurance. See G.B. at 31 concerning the defendant's rap sheet.

1972 was sufficiently remote in time from the years in issue and so prejudicial that any probative value was outweighed by the prejudice of such evidence. February 11, 1972 was some 407 days after the last day of the first taxable year in issue and some 42 days after the last day of the second taxable year in issue. The date becomes even more remote to the last year in issue, 1971, when one views it as it relates to when the bulk of the expenditures were made in such year. (Tr 73, 92, 97)

Fourth, the government alleges that defense counsel conceded that "the jury had ample evidence to totally reject Ann's testimony..." (G.B. 8) Counsel never made such concession. In fact all that defense counsel stated was that no argument would be made vis-a-vis the testimony of Ann Bugliarelli. If the prosecution had read the previous sentence to the one alluded, it would have noted that all counsel did was state a truism. By convicting the defendant, the jury chose not to believe Ann Bugliarelli. The only issue is whether that evidence used to convict the defendant, the alleged admissions and wire-recording, should have been admitted. It is submitted that the government has failed to overcome defendant's assertion that such evidence should not have been admitted and the failure of the trial judge to exclude such was reversible error.

POINT I

The appellee has failed to present legal justification for the admissibility of the alleged admissions of the defendant on June 18, 1973.

In response to the defendant's argument that the failure of the trial court to exclude the alleged admissions of no cash on hand, when interviewed by special agents without being advised of procedural warnings, was reversible error, the prosecution advances three theories.

First, it is asserted that the motion to suppress was not timely. The prosecution, in this regard, concedes that it is appropriate under Rule 103 of the Federal Rules of Evidence to make an evidentiary objection. Nor does he deny that an evidentiary objection was made. (Tr 236-245) What the prosecution seems to rest his argument upon is that the objection was not timely. As defendant noted in his main brief, the objection was made almost at the inception of cross-examination of Special Agent Mongelli, immediately after a foundation had been laid that the warnings had not been given. (T 236-37) To argue that since cross-examination did not immediately follow the prosecution's direct examination because the trial judge ordered the recess, the defendant's objection was untimely is patently absurd.

The government's second contention is that the defendant has failed to show that the IRS procedures set forth in News Releases Nos 894 and 949 have not been followed.[3]

3/ The government states "...suppression would not be required since Bugliarelli has made no showing that he failed to comply with IRS procedures. "[Emphasis added] (G.B. 15). Defendant assumes that "he" should be "the government."

In support, the government argues that the news releases should not be read together, but that News Release No. 494 "was obviously intended to amend and supersede IRS News Release No. 894." The prosecution, however, fails to state that when the Internal Revenue Service intends to have one of its published documents superseded, it specifically so states in the superseding document. See e.g. Executive Order No. 11760, I.R.B. 1974-8, 16; Rev. Rul 74-27, I.R.B. 1974 -3,6; Rev Proc 74-20, I.R.B. 1974-27, 31. Such was not the intention in publishing News Release No. 949. This release was intended to clarify and augment News Release 894. Further, contrary to appellee's unsuccessful effort to undermine the significance of United States v. Bettenhausen, 499 F.2d 1223 (10th Cir. 1974), as set forth in defendant's main brief (D.B. 21), the Bettenhausen case presents a factual situation where the special agents advised the defendant of his rights at all interviews, supporting defendant's view that the two releases are compatible and to be read together. Further support of defendant's position is found in United States v. Dawson, 486 F.2d 1326, 1330 (5th Cir. 1973), where the Court of Appeals for the Fifth Circuit found that the special agents complied with both news releases.. In United States v. Gentile, Dkt Nos. 75-1248, 75-1249, Slip Op 239, 251, (2d Cir., October 22, 1975) this Court refers to the failure to follow the procedures on both releases.

The government also attempts, in stating its position,

to misconstrue the purpose for which the Leahey, Heffner and Sourapas cases were cited. (G.B. 16 at footnote) These cases cases were cited for the legal proposition that if the Special Agents did not follow the guidelines set forth in the news releases then the evidence elicited and the lead flowing therefrom would be suppressed. D.B. 23. Nor does the string of citations, United States v. Morse, 491 F.2d 149, 156 (1st Cir. 1974); United States v. Dawson, 486 F.2d 1326, 1329-30 (5th Cir. 1973); United States v. Mathews, 464 F.2d 1268, 1269-70 (5th Cir. 1972); United States v. Bembridge, 458 F.2d 1262, 1264 (1st Cir. 1972), detract from defendant's position.[4] These cases stand for a proposition that substantial not literal compliance with the enunciated procedures is required. The fact remains that although six interviews took place (D.B. 5) over a six month period, the defendant was given his procedural warnings at only the first interview which is far from substantial compliance.

4/ The government also argues "that nonfradulent [sic] deviations by agents of other federal agencies from their respective internal interviewing instructional manuals, whether or not...published or...publicized, are of no monument." In support several cases are cited. (G.B. 16-17) None of these cases supported such a proposition. In United States v. Bradley, 447 F.2d 224, 226 (2d Cir 1971), cert denied 92 S.Ct. 303, no evidence was presented as to Post Office Department regulations and procedures. In the remaining cases, the issue was custodial interrogation, not compliance with manual instructions. See Accardi v. Shaughnessy, 347 U.S. 260 (1954); Vitarelli v. Seaton, 359 U.S. 535 (1959); Service v. Dulles, 354 U.S. 363, 388 (1957) which is contrary legal authority to the unsupported assertions of the government.

As appellant noted, this Circuit has never decided the issue of whether a special agent must comply with the procedural mandates of the two releases and if they do not whether the evidence received will be excluded. (D.B. 24-25.) Appellee cites to the dicta in United States v. Leonard, Dkt. No. 75-1153, Slip Op. 5843, 5862 (2d Cir., August 28, 1975) whereby this Court has implied, if faced with the issue, that it would not apply the exclusionary rule, where the violations are "unintentional or excusable." See also United States v. Gentile , Dkt. No. 75-1248, Sip Op. 239, 252-53 (2d Cir. October 22, 1975).

Defendant urges that this Circuit not retrench from the position of the First Circuit (United States v. Leahey, 434 F.2d 7 (1st Cir. 1970)), the Fourth Circuit (United States v. Heffner, 420 F.2d 809 (4th Cir. 1969)), the Ninth Circuit (United States v. Sourapas, 515 F.2d 295 (9th Cir. 1975) and the Tenth Circuit (United States v. Bettenhausen, 499 F.2d 1223 (10th Cir. 1974)) that if the procedural guidelines are not substantially complied with, the evidence adduced therefrom will be suppressed. To impose a standard of intentional disregard would create an uncontrolable subjective test, with the special agent, who having failed to comply with the procedural dictates, placed in the untenable position of having to admit intentional disregard before exclusion would be con-

sidered. If the objective test of whether the agent did comply with the mandates of the two news releases is not judicially accepted in this Circuit, then what conceivable purpose would the releases have? Would such a result mean that the uniformity in treatment would not, as was intended by the news releases, apply to those who reside in the Second Circuit?

Finally, appellee argues that assuming arguendo that defendant is correct and the June 18, 1973 alleged admissions should be suppressed, error would be harmless since the government negated taxable sources of income. G.B. 18. In this regard, the government mixes the proverbial "apples and oranges." As defendant stated in his main brief, without the alleged statement of June 18, 1973, the government could not establish cash on hand which is essential to the circumstantial methodology of proof-expenditures method of determining income which was utilized in this case. Holland v. United States, 348 U.S. 121 (1954)

POINT II

The appellee's position that the wire recording of February 11, 1972, the attendant testimony and the bribe money were properly admitted into evidence is unsupported by case law.

The defendant's second point raised on appeal is that the introduction of the wire-recording of Februrary 11, 1972, the attendant testimony, and the bribe money was prejudicial

error and that a mistrial should have been granted. The failure of the Court below to so rule was reversible error.[5] In response, the prosecution offers three theories, none of which overcome defendant's position.

The underpining of the government's position is his "nexus in time theory," i.e., the events of February 11, 1972 are sufficiently proximate to the years in issue. The machinations through which the prosecution goes to establish the nexus is summed up in the statement that the wire-recording was made "Less than 45 days after the taxable years at issue." G.B. 19. As was exhibited earlier, the wire-recording was made less than 45 days after the last day of the last taxable year in issue, some 407 days after the last day of the first taxable year in issue and some 772 days after the first day of the first year in issue. The import of this delineation of time is readily apparent in view of Holland v. United States, 348 U.S. 121 (1954). It was the government's burden to establish a likely source of income for each taxable year. Assuming arguendo that the government established that the defendant was engaged in gambling on February 11, 1972, no evidence was presented to establish such activity prior to January, 1972. See D.B. 12 n 14. How then does the prosecution prove that when expenditures were made in July and August 1971 (Tr 73, 92, 97), let alone 1970, some

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5/ It should be noted that contrary to the statement of the prosecution that defendant did not move for a mistrial (G.B. 30), the defendant so moved on two occasions. See D.B. 33 n. 28.

six months prior to the wire-recording that the likely source for the expenditures was gambling? It simply cannot, and consequently, the probative value of such evidence is clearly outweighed by the prejudicial effect.[6]

The government implies that the purpose of introducing the wire-recording, the bribe money, Officer John and the testimony of the Assistant District Attorney who was present when the appellant pled guilty to paying the $200.00 was for the purpose of corroborating Blatus' testimony and also to rehabilitate Blatus' testimony with "the most reliable evidence available after Blatus' credibility was undercut. (G.B. 22.) The fact remains that the wire-recording and the bribe money were introduced prior to cross-examination of Blatus. (A-19, A-28)

6/ It is in this context that Bugliarelli's statement that he paid "one hundred and a quarter a month" must be viewed. Not only must the prosecution establish that such sum was paid the previous month, but relate such expenditure back throughout two prior years and then further have the jury infer the payment was to protect a gambling operation throughout the two years from which they could thereafter infer a source for the expenditures. The inferences necessary to convict boggle the mind. The trial court made this effort quite easy, however, since its instructions were solely that the jury could infer if they believed the testimony of Blatus (how could they not with the wire-recording) that the defendant had an interest in gambling (Tr 429, 670-71, 786-87). However, for what years, did they have to infer that he had an interest in gambling?

Regarding defendant's position that the reading into the record of the statements of Assistant District Attorney Milch, at the time the defendant pled guilty to giving an unlawful gratuity, was prejudicial error, the prosecution counters by saying that any alleged error was cured by the trial judge's striking the testimony, and in any event, the "factual recitation was merely duplicative of what the jury had already heard..." (G.B. 22) In support of this position the prosecution cites United States v. Bynum, 845 F.2d 490, 503 (2d Cir. 1973) and United States v. Stromberg, 268 F.2d 256, 269 (2d Cir.), cert. denied, 361 U.S. 863 (1959). Both cases are inapposite as the error committed in each was isolated, and thereby are distinguishable from United States v. Tomaiolo, 249 F.2d 683 (2d Cir. 1957), a case relied upon by the defendant herein, where like the instant case, there was an accumulation of errors. (See D.B. 27, 28, 32.) Further, the "factual" recitation by Milch was not duplicative of what the jury had already heard. Milch's statement stated that "It was apparent from the tenor of the conversation this was Joseph Bugliarelli's gambling operation..." (A 106) This statement contradicted Patrolman John's testimony that he believed it was Tarallo's gambling operation (A 77, A 80). In view of the fact that the trial judge in prior instructions had said that the wire-recording was admitted for the jury to determine whether it could infer that the defendant had an interest in gambling, the statement of Milch that it was "apparent" was clearly prejudicial and no instruction could

erase this prejudice from a juror's mind. United States v. DeDominicis , 332 F. 2d 207, 210 (2d Cir. 1964).

The government next reiterates the defendant's statement that the law of this Circuit is that:

> evidence of other criminal offenses is admissible if it is relevant for some other purpose other than merely to show a defendant's criminal character, provided that its potential for prejudicing the defendant does not outweigh its probative value.

United States v. Papadakis, 510 F.2d 287, 294 (2d Cir.), cert. denied, 421 U.S. 950 (1975). (See D.B. 29-34.) The government fails on each of the aspects of the test. First, the evidence was admitted to show criminal character. If not, what conceivable purpose could be served by knowledge that the defendant had an arrest record?[7] The same question applies equally the introduction of the bribe money and the evidence pertaining to Tarallo, all of which was discussed in appellant's main brief and will not be reiterated herein. (See D.B. 28-33.)

Defendant thoroughly discussed the cases of United States v. Vario, 484 F.2d 1052 (2d Cir. 1973), cert. denied 414 U.S. 1129 (1974), United States v. Eliano, 522 F.2d 201 (2d Cir. 1975) and United States v. Terrell, 390 F. Supp. 371 (S.D.N.Y. 1975) and why each is distinguishable from the instant

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7/ The government infers that appellant mislead this court in stating that the trial court never advised that the arrest record of the defendant was to be excised. (G.B. 29) It is submitted that the defendant's brief was clear on this point and was appropriately documented. (D.B. 32) The trial court never advised the jurors that the arrest record had been excised from the aid memoire.

case. (D.B. 37-41) Equally inapposite is United States v. Marquez, 332 F.2d 162 (2d Cir. 1964) cited by the government. (G.B. 23) The issue in Marquez was whether the defendant was guilty of wilful failure to pay a wagering stamp tax. As part of the evidence to establish that the defendant was the individual required to pay the tax, testimony pertaining to exhaustive surveillance during the years in issue was present. This evidence was similiar to the factual presentation in Vario, but starkly different from the "evidence" in the instant case. Simply, there was no evidence of the defendant's implication in gambling prior to February 11, 1972 including no independent corrobative evidence ever presented of such fact. Smith v. United States, 348 U.S. 147 (1954). The government argues that independent corrorborative evidence is defendant's $200 bribe offer. This, however, is nothing more than a boot-strap argument. Where is the independent evidence of such activity during the years in issue as was found in Vario, Eliano and Marquez? Again, the prejudice of such evidence is manifest. This is further borne out by the unsupported assertion that "it...run[s] counter to common sense to conclude Bugliarelli had not in the recent past been in the gambling business." (G.B. 24) There is no independent proof and in the final analysis that is not the real question. Also, what is the recent past? One month? Six months? One year? Two years? If this Court is inclined to follow such a theory and relate back such activity without

independent convincing evidence of the same, for a period of two full years, what then happens to the rationale of Smith v. United States, supra? If ever the doctrine of relation back should not apply, it is this case. McFarland v. Gregory, 425 F.2d 445 (2d Cir. 1970)[8]

8/ The government cites Johnson v. United States, 318 U.S. 189 (1943) to support its proposition that the inference that gambling activities took place in each of the prior years could be made. The government clearly miscontrues the significance of Johnson. In Johnson, the defendant was charged with income tax evasion for the years 1935, 1936 and 1937. The defendant, unlike Mr. Bugliarelli, testified in his own defense. He admitted receiving certain payments from January through October 1937. On cross-examination he was asked whether he received any protection money in 1938. The trial judge found the question appropriate as did the Court of Appeals and Supreme Court since "it bore directly on credibility, Supra. Once he admitted the receipt in 1938, the denial of the receipt in November and December, 1937 became incredulous. In so deciding, the Court drew the distinction between one who testifies and one who fails to do so. In the former case relevant evidence for credibility purposes is admissible. Supra at 195. As defendant stated in his main brief, Johnson is distinguishable because the defendant herein did not testify. Further the 1938 inquiry went to the defendant's credibility which is not in issue herein.

Equally inapposite is United States v. Cirillo, 468 F.2d 1233 (2d Cir. 1972) involving a narcotics conspiracy. The evidence clearly showed activity in the years in issue. Also, the quote set forth by the government (G.B. 27) omits the relevant phrase as to why the evidence in issue was not erroneously admitted. This Court stated:

> Evidence of conduct designed to impede or prevent a witness from testifying is admissible as showing consciousness of guilt...

Supra at 1240. These facts have no bearing on this case.

Finally, the prosecution implies that defendant argues that the summation by the government, in and of itself, is a basis for reversal of the conviction. Again, the prosecution misconstrues the defendant's position. The reference to the summation was made in the following context:

> The bribe money was introducted for one reason - to establish that the defendant corrupted policemen. The prosecutor so stated in his summation...(D.B. 29)

It is equally true that the prosecution cannot rebute this assertion and consequently must resort to twisting defendant's argument to suit the purpose desired.[9]

9/ Equally ludicrous is the prosecution's statement that the defendant's appendix distorts the sequence of summations (G.B. 28). If the prosecution had only read the Index to Appendix and merely looked at the pages, it would be clear that defendant properly placed the summations in the order that they were given. Specifically, the government's opening summation commences on A 109, the defendant's on A 127 and finally the government's reply on A 158.

B. The appellee's argument that the repetitive mention of the defendant's arrest record is not prejudicial is without foundation in law.

The defendant asserted in his main brief that the repetitive introduction of the defendant's arrest record, where his credibility or character was not placed in issue, was prejudicial error. United States v. Tomaiolo, supra. (D.B. 30-34) The government in response argues that since defendant never sought a mistrial he waived the right to argue on appeal, citing Ladakis v. United States, 283 F.2d 141 (10th Cir. 1960); United States v. Calles, 482 F.2d 1155 (5th Cir. 1973); Remus v. United States, 291 F. 501 (6th Cir. 1923). Each case cited by the prosecution is inapposite for the simple reason that the defendant did move for a mistrial both prior to verdict and pursuant to Rule 33 of the Federal Rules of Criminal Procedure. (Tr 700-70; D.B. 33) Thus, not only were the evidentiary objections preserved, timely motions were made.

Regarding the reference in the wire-recording to the arrest record, it must be noted, as well, that defendant moved to suppress the recording, which motion was denied. (See D.B. 6-7.) As the Court noted at trial the reference in the wire-

recording to the arrest record could not have been deleted.[10] (A 36) Although it was physically excised from the aid memoire, the jury was not advised. (D.B. 32.) Even if they were so advised, the prejudice could never have been erased. United States v. Tomaiolo, supra at 695.

The government's brief is deserving of one final comment. Incredulously, the prosecution has placed before this Court a statement as to what the defendant's "rap sheet" shows. This document was never permitted into evidence, and is not properly before this Court.[11] See United States v. Bradley, 447 F. 2d 224, 226 (2d 224, 226)(2d Cir. 1971). Defendant cannot comprehend why the government has done this. It can only be concluded that it is part and parcel of the prosecution's effort

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10/ Equally frivolous is the government's statement that the defendant did not raise objections prior to the trial regarding the defendant's arrest record. An evidentiary hearing was conducted on the suppression of the entire recording. Can these be any doubt that if the recording had been suppressed, the defendant's record would not have been received by the jury, except through the veiled attempts by the prosecution. Further, the very reasons asserted on appeal that the events of February 11, 1973 were so prejudicial that probative value was outweighed, were asserted at the suppression hearing. Counsel for defendant, at the suppression hearing, cited United States v. Beno, 324 F.2d 582 (2d Cir. 1963) in support of his motion to suppress.(S 8) This clearly shows the defendant gave full consideration to the totality of the prejudice of the wire-recording at the suppression hearing.

to influence this Court into believing that the defendant is a man of bad character and not worthy of relief on the legal merits. The facts in evidence and the relevant law, however, establish that the defendant's conviction should be reversed.

11/ The trial court stated when it concluded that the prosecution was going to attempt to introduce the defendant's arrest record, as follows

> ...and don't make any application for the defendant's arrest record. I am not going to allow it in. I struck it from the tape recording and you are not going to get it in another way. (A 103)

It seems that the prosecution overcame this hurdle by placing it before this Court.

CONCLUSION

For all the reasons set forth in the defendant's main and reply briefs, conviction should be reversed and the indictment should be dismissed or, in the alternative, a new trial should be granted.

Respectfully submitted,

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January 15, 1976

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Defendant-Appellant

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the Defendant-Appellant's reply brief has been made on opposing counsel by hand delivering two copies of the same this 15th day of January 1976.

Barry Gordon
Attorney for Defendant-Appellant